

APPLICANTS:
BG&E Light Speed Communications
and Cingular Wireless PCS LLC

BEFORE THE
ZONING HEARING EXAMINER

REQUEST: Variance to permit
disturbance of the 75 foot non-tidal wetland
buffer in the Resource Conservation Area.

FOR HARFORD COUNTY
BOARD OF APPEALS

HEARING DATE: November 13, 2006

Case No. 5568

ZONING HEARING EXAMINER'S DECISION

APPLICANT: BG&E Light Speed Communications

CO-APPLICANT: Dan Principe, Cingular Wireless PCS LLC

LOCATION: BGE Utility Pole 2364
225-feet +/- north of Willoughby Beach Road, Edgewood
West of Flying Point Road
Tax Map: 66 / Grid: 2D / Parcel: 259
First (1st) Election District

ZONING: R2 / Urban Residential District

REQUEST: A variance, pursuant to Section 267-41.1G(4)(b), of the Harford County Code, to permit disturbance to a 75 foot non-tidal wetland buffer in the Resource Conservation Area (RCA).

TESTIMONY AND EVIDENCE OF RECORD:

The Applicants are owners of that 13.5 acre parcel, zoned Urban Residential, and located approximately 225 feet north of Willoughby Beach Road. The Applicants are proposing to co-locate telecommunication antennas on the existing BG&E transmission line tower. The structures associated with the antennas will be located within a 75 foot non-tidal wetland buffer. Accordingly, this variance is requested.

The Applicants presented evidence demonstrating that the existing transmission tower is located within the existing 75 foot non-tidal wetland buffer. Cellular antennas will be located on the tower. The equipment associated with the communication antennas will be located at the base of the tower. The associated equipment is the type of equipment only associated with communication antennas. However, this location is encumbered by a non-tidal wetland buffer.

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For the Applicant first testified Jack Barber, who is employed by Cingular Wireless. Mr. Barber's job responsibilities include the location of cellular antenna communications equipment. The proposed location off Willoughby Beach Road will cover an area which now is insufficiently covered by Cingular Wireless. The Applicant has determined that the existing BG&E transmission tower is an appropriate location for such an antenna and will help fill this coverage void.

Along with the antennas will be constructed an 11-1/2 foot by 20 foot by 10 foot high equipment shelter which services the antennas. This prefabricated equipment shelter will be moved to the site and located approximately 8 feet from the base of the tower on which the antennas will be located. This area has been disturbed in the past by the construction of the transmission tower and no additional ground disturbance will be required by the construction of the shelter, which will be located on concrete piers in order to help minimize further disturbance to the ground level. There will be 6 piers in total, approximately 18 inches in diameter, which will elevate the structure approximately 2 feet above the ground level. There will be no lighting around the site, and the site will be secured by an 8 foot high fence. While the structure will be visible from Willoughby Beach Road, the existing vegetation will obscure the structure from most lines of sight.

The communication antennas themselves will be placed on the tower, approximately 135 feet above ground level.

The equipment will be screened by trees. It should generate no noise of any nature. In operation it will sound similar to a large air conditioner. According to Mr. Barber, the company has never received complaints about noise. These comments were made in response to concerns expressed by Joseph Clifford, an adjoining neighbor, who stated his concern about potential noise from the equipment shed.

Next for the Harford County Department of Planning and Zoning testified Anthony McClune. Mr. McClune explained that the request is only to allow an equipment structure within the 75 foot buffer. The Applicant is entitled as a matter of right to construct the communication antennas on the transmission tower.

Mr. McClune and the Department feel that the Applicant meets or exceeds all applicable standards. Harford County Development Regulations encourage the co-location of communication antennas. Mr. McClune and the Department have found that the area in which the transmission tower is located was disturbed sometime in the past by the construction of the tower. It has been fully graded, and is now maintained by BG&E. The facility itself, once constructed, will have a minimum impact on the buffer area. Mr. McClune sees no adverse impact on water quality. Mr. McClune notes that the State of Maryland Critical Area Commission has reviewed the request and does not object to the proposal.

Accordingly, the Department recommends approval.

Other than Mr. Clifford, there was no testimony or evidence given in opposition.

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APPLICABLE LAW:

Section 267-41.1H of the Harford County Code states:

“H. Variances. Variances from the provisions of this section may only be granted if, due to special features of a site or other circumstances, implementation of this section or a literal enforcement of its provisions would result in unwarranted hardship to an applicant. All applications for variances shall be reviewed by the Zoning Administrator for conformance with applicable provisions of this section, and a written report shall be provided to the Board of Appeals. In granting a variance, the Board shall issue written findings demonstrating that the requested approval complies with each of the following conditions:

- (1) That special conditions or circumstances exist that are peculiar to the land or structure within the County's critical area, and a literal enforcement of the critical area program would result in an unwarranted hardship.*
- (2) That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.*
- (3) That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.*
- (4) That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.*
- (5) That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.*

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- (6) *That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.*
- (7) *That the growth allocation for the county will not be exceeded by the granting of the variance.*
- (8) *That the variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*
- (9) *All applications for variance requests shall be filed in writing in accordance with Section 267-9D of the Zoning Code. Notice of all variance requests and copies of applications filed in accordance with this section shall be sent to the Chesapeake Bay Critical Area Commission within 10 working days of filing with the Department of Planning and Zoning. A copy of the recommendation of the hearing examiner or of the Board in acting on the variance shall be promptly sent to the Commission."*

Section 267-41.1G(4)(b) of the Harford County Code states:

"(b) Nontidal wetlands.

- [1] A 75-foot buffer shall be established adjacent to nontidal wetlands.*
- [2] Development activities shall not be permitted in nontidal wetlands or the 75-foot nontidal wetland buffer, except for permitted development associated with water-dependent facilities as listed in Subsection F(6) of this section.*
- [3] Existing farm ponds and other existing man-made bodies of water for the purpose of impounding water for agriculture, water supply, recreation or waterfowl habitat are specifically excluded from coverage by the provisions of this district.*
- [4] Development activities in the drainage areas to nontidal wetlands shall not adversely affect the quality or quantity of surface or subsurface flow to the nontidal wetland so as to adversely affect its water quality and protection of fish, plant or wildlife habitat value.*

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[5] The location of stormwater management measures is allowed in nontidal wetlands and the 75-foot nontidal wetland buffer only if the Zoning Administrator determines that there is no other technically feasible location and that the water quality benefits of the measures outweigh the adverse impacts on water quality and plant and wildlife habitat values of the nontidal wetlands affected. In determining the adverse impacts of the location of such facilities, consideration can be given to the compensatory value of mitigation measures proposed to replace the lost water quality and habitat value of the affected nontidal wetlands.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Applicants propose a fairly benign use of property owned by BG&E. The Co-Applicant, in the cellular communications business, wishes to co-locate communication antennas on a BG&E transmission tower. The co-location of a communications tower is consistent with the Harford County Development Regulations which encourages the use of existing structures. The antenna will be located off Willoughby Beach Road, which is an area of insufficient cellular coverage.

Antennas can be located as a matter of right on the towers. However, antennas such as those proposed by the Applicant require an equipment shelter generally located at the base of the tower on which the antennas are located. These equipment structures are fairly uniform in shape and design. The structure proposed by the Applicant will be 11-1/2 feet by 20 feet by 10 feet high. It will not be staffed, it will not be lit. It will be enclosed by a fence. The structure will be slightly elevated above ground level by concrete piers out of consideration for the non-tidal wetlands nature of the area.

For the most part the structure will not be visible from Willoughby Beach Road. The only objection expressed by a neighbor was an objection related to potential sound from the structure. Testimony of the Applicants’ witness is that the structure makes very little sound. The sound generated is similar to that of an air conditioner. Cingular Wireless’ representative stated that no complaint has ever been received concerning the noise generated by similar structures.

It is important to note that the structure will not be located in a critical area; it will be located in a buffer. The Critical Area Commission has already reviewed the request and raised no objection. It is accordingly found that no adverse impact will be experienced by any adjoining neighbor or by the neighborhood.

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The appropriate standard for review of this variance requested is set forth in Section 267-41.1H of the Harford County Code which allows a variance to be granted, provided the requested approval complies with each of the conditions set forth within that section. Those conditions, and a summary of findings related to each condition, is set forth as follows:

- (1) *That special conditions or circumstances exist that are peculiar to the land or structure within the County's critical area, and a literal enforcement of the critical area program would result in an unwarranted hardship.*

The area below the transmission line was previously disturbed during the construction of the BG&E transmission line. The area is also maintained by BG&E as part of its routine maintenance program. No new disturbance is proposed. Section 267-53.1.C of the Code encourages the co-location of communication antennas on existing towers. In light of this, denial of the Applicants' request to locate within a buffer would result in an unwarranted hardship. Additionally, the denial of this request may force the Applicants into locating on another site which may require the construction of a new tower or monopole which would be contrary to the intent of the Development Regulations.

- (2) *That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.*

As stated above, the co-location of antennas on existing transmission towers and other structures is encouraged by Harford County Code. The inability of the Applicant to locate a communication shelter at the base of the tower would preclude the location of the antennas on the tower. Such a result is not desirable and would serve no practical purpose.

- (3) *That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.*

The variance request is the minimum necessary to realize the reasonable use of the Applicant's property, and to allow the co-location of an antenna on the BG&E transmission line. No special privilege is accordingly conferred by the granting of this variance.

- (4) *That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.*

This request does not arise from any action of the Applicant, nor is it related to any condition related to any neighboring property.

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- (5) *That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.*

The Applicants have submitted evidence showing specific environmental features of the site will not be affected by the proposed location of the equipment shelter. The Staff Report has concluded, and it is so found, that the location of the equipment shelter, as proposed, will have no adverse impact on the existing transmission line or existing tower.

- (6) *That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.*

The Applicant has proposed the planting of vegetation around the equipment structure. The planting of this vegetation will further minimize the already very minimal impact which is expected from the construction of the equipment shelter.

- (7) *That the growth allocation for the county will not be exceeded by the granting of the variance.*

The variance request will not have an impact on the County's growth allocation.

- (8) *That the variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*

If constructed as proposed, the equipment shelter would have no substantial or detrimental impact on adjacent properties.

- (9) *All applications for variance requests shall be filed in writing in accordance with Section 267-9D of the Zoning Code. Notice of all variance requests and copies of applications filed in accordance with this section shall be sent to the Chesapeake Bay Critical Area Commission within 10 working days of filing with the Department of Planning and Zoning. A copy of the recommendation of the hearing examiner or of the Board in acting on the variance shall be promptly sent to the Commission.*

This provision has been complied with.

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CONCLUSION:

It is accordingly recommended that the requested variance be granted, subject to the following:

1. The Applicants' obtain all necessary permits for the construction of the equipment shelter and for the co-location of the antennas; including any permits for disturbance to the 25 foot State non-tidal wetland buffer from the Maryland Department of the Environment.
2. The Applicants' shall submit a mitigation plan to the Department of Planning and Zoning for review and approval. The mitigation plan shall include the types and species of plants. To avoid future conflicts with the overhead transmission lines, the mitigation plan shall be reviewed and approved by BGE prior to submission to the Department of Planning and Zoning.
3. The mitigation plantings and equipment shelter and associated structures shall be located within a fenced area. The fenced area is necessary to protect the structures as well as the mitigation plantings from damage during times of maintenance by BGE. Signage shall be provided to restrict activity in the area of the mitigation plantings.
4. The limits of disturbance shall be clearly marked and maintained during construction.

Date: January 9, 2007

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on FEBRUARY 7, 2007.